Supreme Court, U.S.
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No. 95-1942

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

DAVID MORAN HARNEY, *Petitioner*

v.

THE STATE BAR OF CALIFORNIA, *Respondent*

To Petition for Writ of Certiorari to the
Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the California Supreme Court's order of discipline against an attorney based on findings of numerous ethical violations raises an important federal question which should be decided by this Court?

(2) Whether the California Supreme Court's determination that Petitioner should be disciplined raises Due Process or Equal Protection questions.

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STATEMENT OF THE CASE

Petitioner, David Moran Harney, ("Petitioner") is an attorney who has been suspended from the practice of law by Order of the California Supreme Court following a disciplinary proceeding in the State Bar Court of the State Bar of California. In the State Bar Court proceedings, Petitioner was afforded an evidentiary hearing by the Hearing Department of the State Bar Court and review of the Hearing Department's decision by the Review Department of the State Bar Court. Petitioner seeks a writ of certiorari to review the California Supreme Court's Order, issued April 25, 1996 (as amended May 7, 1996), denying his petition for review of the order of suspension.[1]

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[1] Pursuant to Rule 954(b), California Rules of Court, a denial of review of a decision of the State Bar Court constitutes a final judicial determination on the merits and the recommendation of the State Bar Court is filed as an order of the Supreme Court.

Among other ethical violations, Petitioner was found to have willfully collected an unconscionable fee in the amount of $266,850.00[2] in violation of the Medical Injury Compensation Reform Act ("MICRA")[3] which set

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[2] The determination that petitioner was wrongfully enriched by $266,850 was based on the State Bar Court's finding that he collected and did not charge an illegal fee. This distinction is important because the MICRA fee limits increased after petitioner agreed to represent his client. If petitioner was found to have charged his client a fee in violation of the MICRA fee caps, the fee in excess of the MICRA limits would have equaled $466,100.

[3] The Medical Injury Compensation Reform Act provides that:

> [a]n attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits ..."

MICRA was the California Legislature's remedy to skyrocketing premiums for medical malpractice insurance policies which implicated the availability of adequate medical care. The maximum fee limits under MICRA were increased in 1988. Petitioner's Petition for Writ of Certiorari (hereinafter "Pet."), Review Department of the State Bar Court, Opinion on Review, App. B, p. B.11, n. 8.

attorney fee limits in medical malpractice contingency cases. As cogently summarized by the Review Department of the State Bar Court:

> This case is about more than an attorney simply collecting more fees than state law allowed. Rather it reveals how an unsophisticated client, in this case an incompetent adult whose mother obtained respondent's services, can be taken advantage of by an attorney who fails to reveal material information in favoring his own interest over the client's interests in receiving all the recovery she is entitled by law to receive.

Pet., Review Department of the State Bar Court, Opinion on Review, Appendix B, p. B2.

Despite a full and complete evidentiary hearing and findings based upon overwhelming evidence of culpability, Petitioner persists in pressing his cause before this Court relying on several unwarranted and baseless contentions.

Petitioner first argues that a writ of review should be granted on the basis that he was denied due process because the State Bar Court found, *inter alia*, that he was grossly negligent in violating the California Rules of Professional Conduct. He contends that this finding of gross negligence was tantamount to a finding that he acted incompetently. Incompetence was a charge that he was not notified of or charged with. Petitioner's argument is tortured and specious. Due process was satisfied because Petitioner was notified of all the charges on which culpability was found and he was provided an opportunity to defend himself.

Petitioner next argues that he was denied due process when discipline was imposed despite his assertion of a good faith belief that he was entitled to the attorney fees it was later determined were illegally collected. Again, Petitioner's contention is groundless because his so-called "honest belief" was contradicted by other evidence,

and even if uncontradicted, did not vitiate the existence of his wrongdoing.

Petitioner's assertion that his disciplinary suspension for misconduct constituted an unlawful taking of property under the Fifth Amendment is not supported by any legal authority. In addition, in accordance with attorney disciplinary proceedings in California, he was provided full due process protection.

Further, Petitioner contends that the MICRA statute is invalid and therefore its enforcement against him violates equal protection. This argument is frivolous on its face.

A. Procedural History

Petitioner was admitted to the State Bar of California on January 11, 1949. On October 12, 1990, a Notice to Show Cause was filed against Petitioner. The Notice to Show Cause alleged various violations of the State Bar Act and the Rules Of Professional Conduct associated with Petitioner's collection of an unconscionable

fee in a medical malpractice case. Petitioner filed his Answer to the Notice to Show Cause on October 26, 1990.

Over a period of ten days between November 2 and December 2, 1992, a hearing on culpability was conducted before the Hearing Department of the State Bar Court. On May 6, 1993, the Hearing Department filed its Notice of Facts Judicially Noticed & Tentative Rulings on Culpability. A hearing to determine the degree of discipline was held on June 16, 1993. On July 31, 1993, the Hearing Department filed its Decision concluding that Petitioner was culpable of misconduct and recommending a thirty (30) day actual suspension.

On August 12, 1993, Petitioner moved for a hearing *de novo* and to introduce additional evidence. On August 18, 1993, the State Bar requested reconsideration of the Hearing Department's Decision. A hearing was held on Petitioner's motion and the State Bar's request for reconsideration on September 9, 1993. Petitioner's motion

was denied as was the State Bar's request for reconsideration.

On or about October 5, 1993, Petitioner requested review of the Hearing Department's Decision contending that the Hearing Department's findings of culpability were in error. On November 3, 1993, the State Bar requested review on the basis that the discipline imposed was insufficient in light of the egregious nature of Petitioner's misconduct. On April 4, 1995, the Review Department filed its Opinion on Review concluding that the Hearing Department's recommendation of discipline was insufficient to address the serious nature of Petitioner's wrongdoing. Accordingly, the Review Department recommended a six month actual suspension.

On or about August 10, 1995, Petitioner petitioned the California Supreme Court for review of the State Bar Court's opinion. The California Supreme Court denied Petitioner's petition for review and adopted the Review Department's recommendation of discipline by order filed

April 25, 1996. On May 7, 1996, the California Supreme Court amended its April 25, 1996 order to reflect that Justice Mosk would have elected to grant the petition. On or about June 12, 1996, Petitioner requested the California Supreme Court to stay the order imposing discipline. By letter dated May 10, 1996, the California Supreme Court returned unfiled Petitioner's request for stay informing him that the order of the Court denying his petition for review was final forthwith and would not be reconsidered. Petitioner now seeks a writ of certiorari to review the California Supreme Court's Order imposing discipline.

Petitioner is currently serving the six months actual suspension.

B. Statement of Facts

The following is a summary of the facts:

On November 4, 1986, Wendy Paulis, 32-years old, underwent elective surgery and never awoke from the anesthesia. She fell into a permanent semi-comatose condition. In December 1986, Petitioner and Loretta

Paulis, Wendy Paulis' mother, met to discuss the possibility of filing a medical malpractice action against the hospital and the attending physicians. Petitioner, an experienced medical malpractice attorney, agreed to investigate the matter to determine whether to accept the case and stated that if there was no successful result, no fee would be requested. Petitioner also informed Mrs. Paulis that in the event of a successful result, the Court would determine what his fee would be. However, Petitioner, who was well-informed of the fee limitation provisions of the Medical Injury Compensation Reform Act ("MICRA") (Calif. Bus. & Prof. Code § 6146)[4], failed to advise Mrs. Paulis about

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[4] Petitioner is reputed to be prominent in the field of personal injury and medical negligence cases. Moreover, Petitioner testified before the California Legislature in 1975 during committee hearings on the MICRA provisions and has remained a steadfast opponent of MICRA. Petitioner or his law firm have participated as amicus curiae in several lawsuits unsuccessfully challenging the constitutionality of the MICRA statute. Also, Petitioner has been a defendant in two published cases brought by clients contesting his fees as implicated by the MICRA provisions. Schultz v.

(continued...)

the fee limitations of MICRA. At no time during Petitioner's representation of Mrs. Paulis did he inform her of the statutory fee caps.

On March 11, 1987, Petitioner filed a medical malpractice complaint against the hospital and its medical staff in the Superior Court of San Bernardino County. Soon thereafter, Mrs. Paulis was appointed her daughter's guardian ad litem and conservator of the person and estate of Wendy Paulis.

During settlement discussions, Petitioner informed his client that the local rules of the state Superior Court governing the payment of attorney fees in tort cases involving incompetents was 25 percent of the recovery if the case settled more than two weeks before trial, and one-third if the case settled within the two weeks or in

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[4](...continued)
Harney, 27 Cal.App.4th 1611, review den. Dec. 21, 1994; Fineberg v. Harney & Moore, 207 Cal.App.3d 1049, review den. April 26, 1989. Pet., Review Department of the State Bar Court, Opinion on Review, App. B, pp. B3-4.

trial.[5] Petitioner agreed to take the lessor fee. Again, Petitioner did not inform his client that the 25 percent recovery in this case would violate the MICRA fee caps.

A compromise of the action was reached following jury selection and several days of testimony with a settlement value of $3,450,000.00.

On July 19, 1988, Mrs. Paulis filed a Petition of Guardian Ad Litem & Conservator of Disputed Claim of Incompetent ("petition for compromise") which requested the court's approval to pay Petitioner $846,250.00 (or 25% of the recovery) in attorney fees and $65,000.00 in expenses. In a hearing before Judge Turner at which only Petitioner and Mrs. Paulis were present, Judge Turner approved the Petitioner for compromise.

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[5] San Bernardino Supreme Court Rules, Rule 1111 sets forth a schedule for determining when charges for attorney's fees "ordinarily will be considered unreasonable in tort actions compromised under section 372 of the [California] Code of Civil Procedure or section 3302 of the [California] Probate Code."

Petitioner did not inform Judge Turner of the applicability of the MICRA fee limitations. Indeed, Judge Turner testified in the State Bar proceedings that the applicability of MICRA did not occur to him because the standard 25 percent award imposed by county guidelines for incompetent cases was normally lower than the maximum permitted by MICRA. Further, Judge Turner testified that if he had been aware of the discrepancy between the fees awarded pursuant to county probate policy and those allowed by MICRA, he would have held a hearing to determine whether he had jurisdiction to exceed the MICRA fee caps. Indeed, Petitioner collected a contingency fee which was $266,850 in excess of the legal limit.

Following settlement of the medical malpractice matter, Mrs. Paulis became aware that Petitioner collected a contingency fee in violation of the limits imposed by MICRA. Mrs. Paulis employed counsel to represent her

daughter Wendy Paulis and herself as guardian in a request for refund of the excess fees.

A written demand was made to Petitioner for return of the excess fees. Petitioner rejected the request asserting that the fee collected was not based upon a contingent fee arrangement and, therefore, not covered by MICRA. Counsel for Mrs. Paulis then filed a disciplinary complaint against Petitioner and also filed a civil suit seeking to collect the overcharged amount.

REASONS FOR DENYING THE WRIT

A. The California Supreme Court's Determination that Petitioner Should be Disciplined Does Not Raise Important Federal Questions

Review on a writ of certiorari is not a matter of right and will be granted only where there are special and important reasons. Rule 10, Rules of Supreme Court of the United States. None of the applicable reasons set forth in Rule 10 are available here. The California Supreme

Court decision at issue does not conflict with that of any other state court of last resort or of a federal appeals court (rule 10(b)); and the California Supreme Court decision at issue does not decide an important federal question of federal law that should be decided by this Court, nor is it in conflict with any decision of this Court (rule 10(c)). Moreover, Petitioner's claims are fact dependent and of no consequence for other litigants.

B. **Petitioner's Claim That He Has Been Disciplined For An Uncharged Ethical Offense Is Meritless**

The State Bar Court found that Petitioner's violation of the MICRA statute was clearly wilful. Pet., Review Department of the State Bar Court, Opinion on Review, Appendix B, p. B15. In addition, the State Bar Court concluded that Petitioner "wilfully" failed to disclose the MICRA fee limitations to his client and the court "through gross negligence." Pet., Review Department of the State Bar Court, Opinion on Review, Appendix B, p.

B23. There is no basis for Petitioner's contention that the Review Department's language that he wilfully violated the Rules of Professional Conduct through gross negligence transformed a well-established finding of material nondisclosure into a charge of incompetence, thereby, imposing discipline for an offense without proper notice. Petitioner's argument is absurd.

Petitioner is entitled to due process meaning that he must be afforded a "fair hearing overall". Dahlman v. State Bar 50 Cal.3d 1088, 1094 (1990); See Matter of Jacobs, 44 F.3d 84, 89-90 (2nd Cir. 1994). Within the umbrella of due process protection, Petitioner is entitled to fair notice of the charges against him which is essential if he is to properly defend himself. Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 564-565 (9th Cir. 1990) ["The State of California provides attorneys subject to discipline with more than constitutionally sufficient procedural due process"]. So long as Petitioner was notified of the charges that were actually filed against

him and had adequate opportunity to respond, due process has been satisfied. See id at 564; In Re Ruffalo, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226 (1968). Petitioner can cite to no authority for the proposition that he must be notified of all possible and uncharged violations that the evidence might sustain.

Notably, Petitioner has not claimed that he was denied notification of the charges for which he ultimately was found culpable or that he was not provided an opportunity to defend himself against these charges. Indeed, Petitioner was properly notified of and eventually disciplined for numerous violations of ethical misconduct. Accordingly, Petitioner was not found culpable for an uncharged offense and was provided adequate due process.

C. **The Evidence Strongly Supports The Order Of Discipline Notwithstanding Petitioner's Groundless Assertions That He Demonstrated An Uncontradicted Good Faith Belief In His Actions**

Petitioner maintains that he advocated a good faith belief in his actions which was undisputed by other evidence. Therefore, he maintains, to find him culpable under these circumstances violates his right to due process. This claim is groundless.

Under state decisional law, whether or not Petitioner held an honest belief in his actions, is not a defense and does not eliminate the existence of the misconduct. See e.g. Read v. State Bar 53 Cal.3d 394, 411 (1991). Moreover, the record supported the Review Department's conclusion that based upon Petitioner's superior knowledge of MICRA issues, he misled the court and his client on a material issue for his own financial

gain. Pet., Review Department of the State Bar Court, Opinion on Review, Appendix B, p. B20.

Petitioner was afforded the right to present a defense and have witnesses testify on his behalf. See Rosenthal v. Justice of the Supreme Court of California, 910 F.2d at 564. Petitioner, however, does not have a concomitant constitutional right to be believed, particularly, in the face of contradictory evidence clearly supporting the findings of culpability.

D. Petitioner's Claim That He Was Deprived Of "Property" Without Due Process In Violation Of the Fifth Amendment Is Belied By The Record

As indicated above, in attorney disciplinary proceedings, due process requires that Petitioner be afforded a full and fair hearing. See Matter of Jacobs, 44 F.3d at 90. Petitioner was clearly provided a full evidentiary hearing with ample opportunity to present evidence. Petitioner can provide no authority for his

groundless assertion that suspension of his license to practice law, based on findings and conclusions that he violated his ethical obligations to his client, constitutes an improper taking of a property right.

E. Petitioner's Claim That He Has Been Denied Equal Protection Of The Laws Based On A Subjective And Conclusory Assertion That The Statute He Violated No Longer Serves A Legitimate State Purpose Is Clearly Meritless

To bolster his petition for review by the Court, Petitioner proffers a conclusory allegation that no legitimate purpose is now or was ever served by the MICRA statute. Clearly, Petitioner's personal opinion that the statute's purpose was unwise and has ceased to exist does not create an equal protection claim. See Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110, 69 S.Ct. 463, 465 (1949) (theoretical inconsistencies in state statute do not present an equal protection question). The

validity of the legislation is presumed (Asbury Hosp. v. Cass County 326 U.S. 207, 215, 66 S.Ct. 61, 65 (1945)), and Petitioner has not shown that the statute bears no relation to the purpose for which it was enacted. See Railway Express Agency, Inc. v. New York, 336 U.S. at 110, 69 S.Ct. at 465.

Finally, the Equal Protection Clause requires only that all legislative classifications have a reasonable basis and that everyone placed within this classification be treated similarly. United States v. Fallon, 407 F. 2d 661 (C.A. Ill.), cert. den., 395 U.S. 908 (1969). Petitioner can make no claim that he has been treated differently from other attorneys similarly situated.

CONCLUSION

It is respectfully submitted that Petitioner has failed to present any facts to support his request for a writ of certiorari, nor has he demonstrated that any of the actions taken by respondent in connection with his case were improper. For these and all of the foregoing reasons,

Respondent the State Bar of California respectfully requests this Court to deny the petition for writ of certiorari.

DATED: June 28, 1996 Respectfully submitted,

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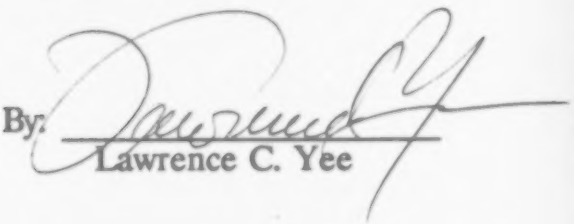
By: 
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